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Supreme Court of the United States

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OCTOBER TERM, 1940

No. 648

MANUEL V. DOMENECH, Treasurer of Puerto Rico,
Petitioner,

vs.

SAN JUAN TRADING CO., INC.,
Respondent.

BRIEF FOR PETITIONER IN REPLY TO "SUGGESTIONS" IN OPPOSITION

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

GEORGE A. MALCOLM,
Attorney General of Puerto Rico,

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior,
Of Counsel.

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BRIEF FOR PETITIONER IN REPLY TO "SUGGESTIONS" IN OPPOSITION

I

The "Suggestions" of the Respondent and its supporting brief in opposition to the petition for certiorari really emphasize the importance of the "Reasons for granting the writ" stated in the Petition (pp. 10-13); particularly the reason which we numbered "(2)" [pp. 11-12, 12-13] relating to the ruling of the prevailing majority of the Circuit Court of Appeals that, as it was phrased by JUDGE MAHONEY [R. 56]:

> "A classification which would not be considered so unreasonable as to deny the equal protection of the laws can still be invalid",

under the prohibition against discrimination between "similar articles" (Sec. 3, Organic Act),—[or "like articles"; Trade Agreement with Sweden]; with which JUDGE MAGRUDER agreed only "with some misgivings"

[R. 59]; and from which JUDGE PETERS dissented [R. 62].

Respondent's "Suggestions" emphasize the fact that the same question arises with reference to the phrase "Like articles" in the Reciprocal Trade Agreement with Sweden. And, manifestly, it may arise in the construction of many treaties and statutes containing phrases of that kind,—"similar articles", "like articles", or kindred phraseology. The importance of the question is obvious. If, as the majority opinion in the Circuit Court of Appeals holds, the effect of such phrase, in a treaty or in a statute, is further to narrow the powers of a legislature, State or Territorial, in making classifications for tax purposes, beyond the constitutional limitations of "due process", "equal protection of the laws" and "uniformity in taxation", then it is of tremendous and far-reaching importance.

Counsel cite no previous decision supporting the holding. It is believed none can be found. It appears to be a new departure. As pointed out in our original Brief [pp. 35-37] in Support of our Petition for Certiorari, the cases cited [R. 57] in JUDGE MAHONEY'S opinion [*Bethlehem Motors Company* vs. *Flynt*, 256 U. S. 421; *Brimmer* vs. *Rebman*, 138 U. S. 78; *Minnesota* vs. *Barber*, 136 U. S. 313] do not support it.

II

The object or purpose of this insular taxing statute is not necessarily limited to the sole purpose of raising revenue. Manifestly, as pointed out in our original Petition for Certiorari and Supporting Brief (pp. 6-7, 14-18, 23-26) **the Legislature had in mind also the purpose of exercising its local police powers and local taxing powers in the classification of objects of taxation, for *the general welfare of the community*, and for the protection and encouragement of its local industries.** And [*original Supporting Brief*, Point VII-H, p. 26], ever since the decisions of this Court in *Hampton & Co.*

vs. *United States*, 276 U. S. 394, 411, and in *Cincinnati Soap Co.* vs. *United States*, 301 U. S. 308, 320, it is no longer open to doubt,

> "That Congress has power to levy a tax *with the collateral purpose of thereby protecting the industries* of the United States (*Italics supplied*).

With relation to local matters, that rule is equally applicable to the powers of the Legislature of Puerto Rico.

Insofar as any of the earlier cases cited by the Respondent ("Suggestions", "V", p. 14) might seem to indicate a narrower rule, they are to be considered as controlled by the later decisions of this Court in the *Hampton & Co.* and *Cincinnati Soap Co.* cases. See also *Madden* vs. *Kentucky*, 309 U. S. 83, 87-88, 93, cited and quoted in our original Supporting Brief (pp. 31-32).

III

It is immaterial that the statute here in question omitted to t x matches packed in boxes with wooden outers or shucks, containing less than twenty-five (25) matches or more than fifty (50) matches in the box. [Sub-division 7 of section 16 of the Internal Revenue Law of Puerto Rico, as amended by Act No. 146 of May 9, 1938; Appendix I to our Petition for Certiorari and Supporting Brief, pp. 43-45; original complaint of Respondent in the District Court, "*Second*", R. 6-7; Respondent's "Suggestions" in opposition here, p. 6 "(b)", and p. 18.]

The ordinary wooden box in universal use, in which matches are sold [whether "*square* stick" or "*round* stick", without any distinction or difference whatever in this respect, in commercial usage], is the little box containing from 25 to 50 matches. Taxation is a practical matter. The Legislature was taxing sales of packages in the ordinary commercial form, from the taxation of which

substantial revenue might be derived. Those packages were the ordinary wooden box containing 25 to 50 matches to the box, as well as paper or cardboard matches in books, and other ordinary commercial forms. **The Legislature was under no obligation to levy a tax on an unusual,—practically non-commercial,—form of package,** from which the Legislature might well determine that no substantial revenue was to be derived, worth the cost of collection.

It is not alleged (R. 6-7, *supra*), nor is it claimed in Respondent's "Suggestions", that there was in this omission by the Legislature any discrimination whatever against the square match or against the Respondent, or any manifestation of hostility whatever against any one. So far as this omission goes, the square match and its importers, such as the Respondent, are put on exact equality with the round match and its local manufacturers or importers. None of them are taxed at all on any sales of matches packed in wooden boxes containing less than 25, or more than 50, matches to the box,—that is to say on unusual, commercially negligible, packages.

It is well settled that the provision in Section 2 of the Organic Act of Puerto Rico, "That the rule of taxation shall be uniform", does not impose any requirement of *universality* in taxation,

> "unless there is a clearly hostile discrimination against certain persons or classes, not based upon any reasonable distinction". *Gallardo* vs. *Porto Rico Ry. Light & Power Co.* 18 F. (2d) 918, 923-925, quoting *Cooley's Constitutional Limitations* (5th Ed.) p. 638. And see also the other authorities there cited.

Whether, therefore, this omission on the part of the Legislature to tax wooden boxes of unusual non-commercial forms of less than 25 or more than 50 matches to the box was the result of oversight on the Legislature's part in enacting the amendatory statute, Act No. 146 of May

9, 1938 [as would seem to be indicated by the next amendatory statute, four months later, Act No. 14 of September 9, 1938, Appendix I to the Petition for Certiorari, pp. 46-47, which supplied this omission], or whether it was a deliberate legislative determination that it was not worth while to tax these unusual, commercially negligible, packages,—in either event it was within the Legislature's powers. There was no discrimination in it against any one. It is immaterial here for any purpose. All of the Judges of the Circuit Court of Appeals agree that there is no violation of the rule of unformity in taxation. [*Confer*, Petition for Certiorari, p. 2.]

IV

As pointed out in the Petition for Certiorari (p. 9), two of the three Judges of the Circuit Court of Appeals [JUDGE MAGRUDER agreeing here with JUDGE PETERS] agreed that the **Respondent here, a local corporation of Puerto Rico, is not in position to avail itself of the Trade Agreement with Sweden.** That is a contract for the benefit of the Swedish government and its nationals. Respondent cites no authorities to the contrary. The recent decision of this Court, to which it refers ("Suggestions", pp. 12, 13, 39) in *Bacardi Corporation* vs. *Domenech, Treasurer*, No. 21 at the present term of this Court, decided December 9, 1940, does not help it here. The situation there was wholly different. Not only was the petitioner there, the Bacardi Corporation of America, *not* a local domestic corporation of Puerto Rico [a Pennsylvania corporation], but moreover, as the District Court had there specifically found, its relations to its parent corporation, the Cuban company, *Compania Ron Bacardi, S. A.*, were such, and so close, that it was really merely the hand or *alter ego* of the Cuban company. Looking through the form to the substance, it was in effect the Cuban company itself that was there asserting its rights under the Trade-mark Convention

to which both Cuba and the United States were signatories.

And there was, of course, in that case, no question of the construction of any such phrase as "*similar articles*", or "*like articles*", or as to whether such a phrase in a treaty or act of Congress can have the effect of further narrowing the power of a State or Territorial legislature to make classifications for tax purposes, more closely than it is limited under the Fifth or Fourteenth Amendment,—[or under the similar provisions carried into Section 2 of the Organic Act for Puerto Rico];—or whether the purpose of such provisions is not really, as it has always heretofore been understood to be, simply to place the foreigner,—[or the importer of foreign goods],—on a plane of *exact equality* with the citizen, and to give him *exactly the same rights* which are secured to the citizen by the constitutional guarantees; and nothing else,—neither more nor less.

That is the crucial question here.

V

It is respectfully submitted that the writ of certiorari should be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 648

MANUEL V. DOMENECH, TREASURER,
Petitioner,

vs.

SAN JUAN TRADING COMPANY, INC.

SUGGESTIONS OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF SUGGESTIONS.

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SAN JUAN TRADING COMPANY, INC.

SUGGESTIONS OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Respondent, San Juan Trading Co., Inc., a corporation organized and existing under and by virtue of the laws of Puerto Rico, respectfully submits the following suggestions in opposition to the petition for writ of certiorari filed in this cause.

Summary Statement.

This action was brought to recover from the Treasurer of Puerto Rico, the sum of $26,400.00, paid under protest and collected as excise taxes due and levied upon 88,000 gross of 144 boxes each of friction safety uncolored square stick matches, packed in boxes with wooden outers or shucks, containing not less than 25 but not more than 50

sticks per box, which had been brought by the respondent into Puerto Rico to be sold, transported, transferred, used or consumed therein, the said friction safety matches having been originally produced or manufactured in the Kingdom of Sweden and imported into the United States after August 5, 1935 (R. 2).

This tax was levied and collected under the provisions of Subdivision 7 of Section 16 of Act No. 85, approved by the Legislature of Puerto Rico, August 20, 1925, commonly known as the "Internal Revenue Law of Puerto Rico" (Laws of 1925, p. 585), as amended by Act No. 146, approved May 9, 1938 (Laws of 1938, p. 325), which statute is set out in Appendix I to the supporting brief attached to the petition (pp. 43-45).

The validity of this tax and the authority of the petitioner to levy and collect the same were challenged on the grounds that the statute in question:

(a) Deprived the respondent of its life, liberty and property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution and paragraph 1 of Section 2 of the Organic Act of Puerto Rico, approved March 2, 1917, c. 145, 39 Stat. 951, 48 U. S. C. A. 737;

(b) Denied the respondent the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution and paragraph 1 of Section 2 of the same Organic Act of Puerto Rico;

(c) Violated the provisions contained in paragraph 22 of Section 2 of the same Organic Act of Puerto Rico to the effect that the rule of taxation in Puerto Rico, shall be uniform;

(d) Violated the provisions contained in paragraph 2 of Section 3 of the same Organic Act of Puerto Rico,

as amended by the Act of March 4, 1927, c. 503, Sec. 1, 44 Stat. 1418, 48 U. S. C. A. 741a; and,

(c) Contravened and violated the provisions of Article VI of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden, signed May 25, 1935, 49 Stat. (Part 2) 3755.

Opinion of the District Court.

The District Court in its Opinion (R. 18) held:

1. That there is no rational basis upon which to base a classification for taxation purposes between ROUND stick and SQUARE stick friction safety matches;

2. That there is no rational basis upon which to sustain a valid classification between SQUARE stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box and the same SQUARE stick matches packed in boxes with wooden outers or shucks containing less than 25 or more than 50 sticks per box;

3. That ROUND stick and SQUARE stick friction safety matches are SIMILAR articles within the provisions of paragraph 2 of Section 3 of the Organic Act of Puerto Rico, as amended;

4. That ROUND stick and SQUARE stick friction safety matches are LIKE articles within the purviews of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden, signed May 25, 1935; and

5. That the petitioner was only entitled to levy and collect the same excise tax on SQUARE stick friction safety

matches as is levied on ROUND stick friction safety matches under the challenged statute.

Appeal and Cross-Appeal.

The judgment of the District Court (R. 35) limited the refund to be made to the respondent, to the sum of $17,600.00, thus allowing only the return of 20 cents per gross on each of the 88,000 gross of boxes of matches above referred to. From that part of the said judgment denying the refund of the additional $8,800.00 claimed, the respondent was allowed an appeal to the United States Circuit Court of Appeals for the First Circuit, the petitioner having also taken an appeal from the judgment in its entirety (R. 35, 37).

Opinion of the Circuit Court of Appeals.

The Opinion of the Circuit Court of Appeals was rendered by a divided court. Each of the three judges wrote a separate opinion. Judge Mahoney, who wrote the Opinion of the court (R. 47-59), held the legislation challenged invalid on all the grounds upon which it was attacked, except the alleged violation of "uniformity in taxation", his opinion being in substance, the same opinion which had been rendered by the District Court (R. 18-34).

Judge Magruder concurred in the result (R. 59-62), on the ground that the classification in question violates, as expressed by him, "the spirit, and I think the letter of the proviso in Section 3 of the Organic Act" (R. 60) added by the "Butler Act" of March 4, 1927, c. 503, Sec. 1, 44 Stat. 1418, 48 U. S. C. A. 741 a.

Judge Peters dissented from the conclusion of the majority of the Court, holding the classification made to be reasonable, and that even though it may be called "narrow", that fact, in his opinion, did not authorize the court to say

that it should not be applied, adding that the discrimination which may result "is incidental to the PRINCIPAL PURPOSE of the Act which is the legitimate one of fostering home industries" (R. 62).

On the question raised by the appeal allowed to the respondent (*ante*, p. 4) with reference to the refund of the full tax paid, all three judges agreed with the District Court that the invalidity of the higher discriminatory rate only affected the excess over the lower rate, thus limiting the refund to 20 cents per gross of boxes, instead of the 30 cents claimed. This question, however, is not involved in this petition.

Petitioner's Position.

The position of the petitioner is:

1. That the Legislature of Puerto Rico, can validly make a classification of uncolored friction safety matches into SQUARE and ROUND stick matches, to protect and encourage a local industry, without violating the guarantees either of due process, of equal protection of the laws, or of uniformity in taxation, nor the provision contained both in the proviso added by the "Butler Act" to the Organic Act and in the Trade Agreement with the Kingdom of Sweden, against discrimination between articles the growth, produce or manufacture of the United States or foreign countries and "like" or "similar" articles grown, produced or manufactured in Puerto Rico.

2. That the respondent, being a domestic corporation of Puerto Rico, cannot invoke the Trade Agreement between the United States and the Kingdom of Sweden as regards a discriminatory tax exaction against articles produced or manufactured in that Kingdom and brought into Puerto Rico by the respondent.

Respondent's Position.

The respondent contends in opposition:

1. That the purpose of the "Internal Revenue Law of Puerto Rico" is to raise revenue, and the classification between ROUND and SQUARE uncolored safety matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box, which has been made by the said statute is arbitrary because it is not based upon any differences bearing a substantial, reasonable and just relation to the purpose for which it is made, or to the particular subject of the legislative action.

2. That the excise tax in question is discriminatory and void, because:

(a). It subjects SQUARE uncolored stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box, to an assessment 20 cents higher than that levied on ROUND uncolored stick matches, similarly packed; and

(b). It subjects SQUARE stick matches packed in boxes with wooden outers or shucks containing *not less* than 25 but *not more* than 50 sticks per box, to an assessment of 30 cents per gross of 144 boxes, while NO TAX WHATSOEVER is levied on the *identical* SQUARE stick matches, when packed in boxes with wooden outers or shucks containing *less* than 25 or *more* than 50 sticks per box.

3. That ROUND and SQUARE uncolored friction safety stick matches, are LIKE OR SIMILAR articles, within the provisions contained in the proviso added by the "Butler Act" to the Organic Act of Puerto Rico, and in the Trade Agreement with the Kingdom of Sweden.

4. That the Legislature of Puerto Rico, in the exercise of its police or taxing powers cannot validly resort to taxing

discriminations against articles the growth, produce or manufacture of the United States or foreign countries, and "like" or "similar" articles, grown, produced or manufactured in Puerto Rico.

5. That the provision against discrimination of similar articles the growth, produce, or manufacture of the Kingdom of Sweden, contained in the Reciprocal Commercial Trade Agreement between the United States and the Kingdom of Sweden, cannot be overridden by the Legislature of Puerto Rico and can be invoked by the respondent.

6. That SQUARE stick matches are exempted from other or higher taxes than are levied on ROUND stick matches.

Statutes.

The Constitutional Amendments; the pertinent provisions of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden; and the Federal and local statutes involved in the determination of this case, are set out in the appendices to the supporting brief attached to the petition (pp. 41-55).

Reasons for Granting the Writ.

The petition (pp. 10-13) sets forth, as "Reasons for Granting the Writ" that:

1. This case presents important questions of Federal law, that have not been and it is believed should be decided by this Court, as follows:

> (a) Can the Legislature of Puerto Rico, under the "due process" clause, exercise its powers of classification in taxation for the encouragement of a type of manufacturing process adapted to develop local manufacturing industries in the Island, as against other processes not so adapted?

(b) Does the prohibition against discrimination between articles the growth, produce or manufacture of the United States or foreign countries and "like" or "similar" articles grown, produced or manufactured in Puerto Rico, contained in the Butler Act and in the Trade Agreement with Sweden, narrow the Legislature's powers of classification in taxation, and affect the legislative power to classify articles or types of processes into groups for tax purposes, or does it merely prevent discrimination within the same groups of articles?

(c) Can this respondent, a domestic corporation of Puerto Rico, invoke the Swedish Trade Agreement?

2. This case presents conflicts of opinion among the judges of the Circuit Court of Appeals for the First Circuit.

3. That the prevailing decision is in conflict with applicable decisions of this Court,

(a) As to the extent of the local legislative powers of the Legislature of Puerto Rico;

(b) As to the "freedom of classification" of the legislative powers in matters of taxation;

(c) As to the legislative power to lay taxes to encourage domestic industry.

4. That other decisions of this Court have been misapplied.

The "Reasons for Granting the Writ" Are Not Sufficient.

The respondent submits that the petition does not state sufficient reasons for granting the writ, because:

1. All of the important questions of Federal law set forth in the petition, have been either decided by this Court, or are not involved in this case in that,

(a) The excise tax in question is not levied and collected on a "type of manufacturing process" but on a finished article.

(b) That the prohibition against discrimination contained in Section 3 of the Organic Act and in the Swedish Trade Agreement, limits the power of classification in taxation vested in the Legislature of Puerto Rico as regards discriminatory exactions between articles the growth, produce, or manufacture of the United States or foreign countries or the Kingdom of Sweden, and "similar" or "like" articles grown, produced or manufactured in Puerto Rico.

2. The fact that different judges may not be in accord in rendering an opinion is not a sufficient reason as to call for an exercise of this Court's power of review or supervision, specially if the prevailing decision is correct.

3. That the prevailing decision is not in conflict with any of the decisions of this Court, nor have other decisions been misapplied.

Conclusion.

The decision of the Circuit Court of Appeals invalidating the tax in question is correct, and the petition for writ of certiorari should be denied.

L. E. Dubon,
Attorney for the Respondent.

BRIEF IN SUPPORT OF SUGGESTIONS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

POINT I.

The Respondent Cannot be Deprived of His Life, Liberty or Property Without Due Process of Law, Nor Denied the Equal Protection of the Law.

The "due process" clause of the Fifth Amendment to the Constitution as well as the provisions of the "equality" clause of the Fourteenth Amendment providing against any enactment which shall deny to any person the equal protection of the laws, are both included in Section 2 of the Organic Act of Puerto Rico, in exact terms. This, as held in *Sancho Bonet* v. *Bacardi Corporation of America,* 109 F. (2d) 57, precludes any detailed discussion as to whether these parts of the Federal Constitution extend to Puerto Rico.

The respondent in this case is a person and as such entitled to the full protection and to the rights secured by the foregoing provisions of the Federal Constitution and the Organic Act of Puerto Rico. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 54 L. Ed. 536; *Pembina Consol. Silver Min. & Milling Co.* v. *Commonwealth of Pennsylvania,* 125 U. S. 181, 31 L. Ed. 650; *Gulf Colorado & Sta. Fe Railway Co.* v. *Ellis,* 165 U. S. 150, 41 L. Ed. 666.

Point II.

The Rule of Taxation in Puerto Rico is That All Taxes Shall be Uniform, and This Rule Also Applies to Excise Taxes.

Paragraph 22 of Section 2 of the Organic Act of Puerto Rico provides:

> "That the rule of taxation in Porto Rico shall be uniform."

This "uniformity" rule of taxation also applies to excise taxes. *Sancho Bonet* v. *Corona Brewing Corp.*, 89 F. (2d) 479, certiorari denied in *Corona Brewing Corp.* v. *Sancho Bonet*, 302 U. S. 699, 82 L. Ed. 581; *Domenech* v. *Havemeyer*, 49 F. (2d) 849; *Sanchez Morales & Co., Inc.*, v. *Gallardo*, 18 F. (2d) 550; *Goodyear Tire & Rubber Co.* v. *Gallardo*, 18 F. (2d) 926.

Point III.

The Legislative Powers of the Legislature of Puerto Rico in Respect of Local Matters are Subject to the Restrictions or Limitations Contained in the Organic Act of Puerto Rico, or Other Applicable Acts of the Congress.

The grant of legislative power in respect of local matters contained in Section 37 of the Organic Act of Puerto Rico, is as broad and comprehensive as language could make it. *People of Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 82 L. Ed. 235; *People of Puerto Rico* v. *Rubert Hermanos*, 309 U. S. 543, 84 L. Ed. 916. But inasmuch as these powers have been delegated by Congress pursuant to the "territorial" clause contained in the Constitution (Article IV, Section 3, Clause 2), in the exercise of those powers, the Legislature of Puerto Rico is limited by the provisions of the Organic Act or other applicable Acts of the Congress. *Domenech*

v. *National City Bank*, 294 U. S. 199, 79 L. Ed. 857; *Haavik* v. *Alaska Packers Association*, 263 U. S. 510, 68 L. Ed. 414; *Sancho Bonet* v. *Corona Brewing Corp.*, 89 F. (2d) 479; certiorari denied in *Corona Brewing Corp.* v. *Sancho Bonet*, 302 U. S. 699, 82 L. Ed. 581; *People of Puerto Rico* v. *Shell Co., supra; People of Puerto Rico* v. *Rubert Hermanos, supra.*

POINT IV.

The Reciprocal Commercial Trade Agreement With Sweden Bound Puerto Rico and it Cannot be Overridden by the Legislature of Puerto Rico.

The provisions contained in the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden prohibiting discriminatory taxation or exactions between articles the growth, produce or manufacture of Sweden, and LIKE ARTICLES of national origin or any other foreign origin are binding in Puerto Rico as part of the supreme law of the land, and also because this Agreement was entered into pursuant to the provisions of other acts of Congress, and these acts did not enlarge the legislative or taxing powers conferred to the Legislature of Puerto Rico by the Organic Act.

In the recent case of *Bacardi Corp.* v. *Domenech*, decided December 9, 1940, this Court said:

> "This treaty on ratification became a part of our law. No special legislation in the United States was necessary to make it effective. Head Money Cases, 112 U. S. 580, 598, 599, 28 L. Ed. 798, 803, 804; Asakura *v.* Seattle, 265 U. S. 332, 341, 60 L. Ed. 1041, 1044. The treaty bound Puerto Rico and could not be overridden by the Puerto Rican Legislature. Asakura *v.* Seattle, supra, Nielsen *v.* Johnson, 279 U. S. 47, 52, 73 L. Ed. 607, 610; United States *v.* Belmont, 301, U. S. 324, 331, 81 L. Ed. 1134, 1139.

POINT V.

Even in Questions of Local Policy, the Legislature of Puerto Rico Must Submit to the "Treaty Making" Power of the United States.

This Court, in *Bacardi Corp.* v. *Domenech, supra,* has said:

> "The exigencies of local trade and manufacture which prompted the enactment of the statute cannot save it, as the United States in exercising its treaty making power dominates local policy."

POINT VI.

The Legislature of Puerto Rico is Vested With a Wide Discretion as Regards Distinctions or Classifications of Subjects of Taxation, Provided the Attempted Classification is Not Arbitrary.

The Legislature of Puerto Rico, as all legislative bodies, possesses wide powers of classification of the objects of legislation or of the persons whom it affects, and the "equal protection" clause does not prohibit this. This rule is so soundly established, that no citations are required. *New York Rapid Transit Corporation* v. *New York,* 303 U. S. 573, 578, 82 L. Ed. 1024, 1029. However, the classification must rest upon some rational basis, upon some difference, bearing a fair, reasonable, substantial and fair relation to the object of the legislation, to the purpose for which it is made or to the particular subject of the legislative action, a mere difference being not enough. *New York Rapid Transit Corporation* v. *New York,* 303, U. S. 573, 584, 82 L. Ed. 1024, 1033; *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 54 L. Ed. 536; *Northwestern Mut. Life Ins. Co.* v. *Wisconsin,* 247 U. S. 152, 72 L. Ed. 1025; *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 64 L. Ed. 989; *Louisville Gas & E. Co.* v. *Cole-*

man, 277 U. S. 32, 72 L. Ed. 770; *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264; *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 74 L. Ed. 775; *Stebbins* v. *Riley*, 268 U. S. 137, 69 L. Ed. 884; *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 69 L. Ed. 169; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 70 L. Ed. 557; *Beers* v. *Glynn*, 211 U. S. 477, 53 L. Ed. 280; *Magoon* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. Ed. 1037; *Merchant's & M. Nat. Bank* v. *Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236; *Beel's Gap R. Co.* v. *Commonwealth of Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Edye* v. *Robertson*, 112 U. S. 580, 28 L. Ed. 798; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 81 L. Ed. 1122; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245; *Nashville Chattanooga & St. Louis R. Co.* v. *Walters*, 294 U. S. 405, 79 L. Ed. 949; *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330, 79 L. Ed. 1468.

Point VII.

The Object or Purpose of the "Internal Revenue Law of Puerto Rico" is the Raising of Revenue.

There can be no doubt but that the object or purpose of the "Internal Revenue Law of Puerto Rico", as that of all taxing statutes, is the raising of revenue, *Stebbins* v. *Riley*, 268 U. S. 137, 69 L. Ed. 884; *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 64 L. Ed. 989; *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 69 L. Ed. 169. The title of this Act itself expresses this object or purpose in clear and distinct terms when it says:

> "An act to provide revenues for the People of Porto Rico by levying certain sale taxes and taxes for the manufacture, use, sale and consumption of certain products and by the levying of certain excise and license taxes on certain occupations, industries or businesses; to impose certain penalties; to repeal the laws in force

providing for excise and license taxes, and for other purposes."

POINT VIII.

The Tax in Question is Not Levied on the Process of Manufacturing Matches, But on the Finished Product.

Subdivision 7, of Section 16 of the "Internal Revenue Law of Puerto Rico", as amended by Act No. 146, approved May 9, 1938, levies an excise tax *"on matches"* and not *on the process of manufacturing matches*, and therefore the question of the power of classification in taxation of the Legislature of Puerto Rico for the encouragement of a type of manufacturing process adapted to develop local manufacturing industries in Puerto Rico as against other processes not so adapted, is not involved in this case.

POINT IX.

The Classification Between "Round" and "Square" Stick Matches Contained in Subdivision 7 of Section 16 of the "Internal Revenue Law of Puerto Rico", as Amended, Bears no Fair, Reasonable, Substantial and Just Relation to the Object of the Legislation.

The power to classify includes as well the power to subdivide the various subjects of taxation into distinct classes and different rates can be levied on the several classes, provided the classification is reasonable, and not arbitrary. The mere fact of classification, however, is not sufficient to relieve a statute from the reach of the "equality" clause, inasmuch as any classification must always rest upon some difference which bears a substantial, just and proper relation to the object of the legislation and the classification must be based on differences which furnish a reasonable ground for making a distinction between the different classes. *Gulf, Col. & S. Fe R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. Ed. 666.

Act No. 146, approved May 9, 1938 (Laws of 1938, p. 325) amending Subdivision 7 of Section 16 of the "Internal Revenue Law of Puerto Rico"; approved August 20, 1925 (Laws of 1925, p. 584), makes a separate classification of matches levying a different excise on each of the different classes into which that classification has been subdivided, as follows:

(a) ROUND and SQUARE Uncolored Sticks, packed in boxes *with* wooden outers or shucks, containing *not less* than 25 but *not more* than 50 sticks per box. (Subdivisions (a) and (c).)

(b) ROUND and SQUARE Colored, Fancy Sticks, packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box. (Subdivision (b) and (c).)

(c) Matches packed in boxes *with other* than wooden outers or shucks, regardless of *whether or not* of ROUND or SQUARE sticks, or *whether or not* Colored or Uncolored, containing *not less* than 25 but *not more* than 50 sticks per box, and those boxes containing *less* than 25 or *more* than 50 sticks per box (Paragraph 5 of Subdivision 7).

(d) Paper or cardboard matches in books of 20 matches each, and paper or cardboard matches in books of more than 20 matches each (Paragraph 7 of Subdivision 7).

(e) Wooden matches sold in the form of books (Paragraph 8 of Subdivision 7).

(f) Sperm or wax matches (Paragraph 9 of Subdivision 7).

As regards ROUND and SQUARE stick matches, this subdivision is not based upon any distinct, peculiar, intrinsic or particular grade or quality of the matches involved nor upon any difference of substance, situation or condition thereof. The law provides a tax on matches "whether sul-

phur, safety, friction, or fuses, or by whatever name known", and there is no other basis for the classification than the shape or form of the stick, the number of sticks per box, and the nature of such box or package, if with wooden outers or shucks, or otherwise, the tax rates being the following:

1. A gross of 144 boxes *with* wooden outers or shucks, containing each *not less* than 25 but *not more* than 50 uncolored ROUND stick matches, is levied with a tax of *ten cents per gross*—Subdivision (c)—while uncolored SQUARE stick matches, similarly packed, are burdened with a tax of *thirty cents per gross*—Subdivision (a).

2. A gross of 144 boxes *with* wooden outers or shucks, containing each *not less* than 25 but *not more* than 50 colored or fancy ROUND stick matches, is levied with a tax of *fifteen cents per gross*—Subdivision (d)—while colored or fancy SQUARE stick matches, similarly packed, are burdened with a tax of *thirty-six cents per gross*—Subdivision (b).

3. A gross of 144 boxes *with other* than wooden outers or shucks, containing each *not less* than 25 but *not more* than 50 matches to a box, regardless of *whether or not* these matches are colored or fancy or uncolored, or *whether or not* they are ROUND or SQUARE stick, is levied with a tax of *thirty-six cents* per gross and with a tax of *six cents on each thousand matches or fraction thereof*, if the boxes contain *less* than 25 or *more* than 50 matches to the box—Subdivision 7, clause (6).

4. A gross of 144 boxes *with* wooden outers or shucks, containing each *less* than 25 or *more* than 50 matches to a box, regardless of *whether or not* these matches are colored or fancy or uncolored, or *whether or not* they are ROUND or SQUARE stick, is levied with No Tax Whatsoever—Subdivision 7, clause (i).

It is significant, as pointed out both by the District Court (R. 29) and the Circuit Court of Appeals (R. 53) that the tax rate differential between the ROUND and the SQUARE stick matches affect only the colored or fancy and the uncolored SQUARE stick matches packed in boxes *with* wooden outers or shucks containing *not less* than 25 but *not more* than 50 sticks to the box; that there is no difference in rates between ROUND and SQUARE stick matches, whether colored or fancy, or uncolored, packed in boxes *with other* than wooden outers or shucks; and that absolutely No Tax Whatsoever is imposed on ROUND or SQUARE stick matches, whether colored or fancy or uncolored, if packed in boxes *with* wooden outers or shucks containing *less* than 25 or *more* than 50 sticks per box.

The complaint charged (R. 10) that "uncolored SQUARE stick matches and uncolored ROUND stick matches are one and the same article, without any difference whatsoever and no substantial, reasonable and just relation upon which to base a distinct classification for purposes of taxation, charges or exactions." The answer of the petitioner (R. 15) denied these allegations, saying that "uncolored square stick matches and uncolored round stick matches are not one and the same article, and that uncolored square stick matches and uncolored round stick matches have different characteristics of a substantial nature sufficient to justify the Legislature in making a reasonable and distinct classification of each, for purposes of taxation."

What are those "different characteristics of a substantial nature sufficient to justify the legislature in making a reasonable and distinct classification of each, for purposes of taxation" referred to in the answer filed by the petitioner?

The case was submitted on an agreed statement of facts, and therefore those "different characteristics of a substantial nature" and the reasons warranting the distinct classi-

fication between ROUND and SQUARE uncolored stick matches, must appear, if at all, in that statement of facts. These facts are as follows (R. 16-18):

"1. That the matches with respect to which respondent paid under protest the taxes involved in this suit were manufactured in Sweden; have an approximately square section; are packed 40 to a box and retail and for many years have retailed, at one cent per box. A box of these matches attached to the Stipulation (R. 17) shows that they are branded 'Three Stars.'

2. That on November 14, 1935, there was organized in Puerto Rico a corporation under the name of Pan American Match Company, for the purpose of manufacturing and selling matches, which corporation on or about the latter part of February 1939, began to produce, distribute, and sell in Puerto Rico, wooden safety matches, packed 40 to a box, with an approximately circular cross-section, which are retailed also at one cent per box. A box of these matches is attached to the Stipulation, and shows that they are branded 'Tres Palmas' (R. 17).

3. That the said 'Tres Palmas' are the only wooden matches produced in Puerto Rico.

4. That the only round-stick matches packed in wooden outers which are at present sold in Puerto Rico are the said 'Tres Palmas' matches produced by the Pan American Match Company; the 'Gold Medal' matches produced in continental United States by the Diamond Match Company, and the 'Three Stars' matches recently produced by Jonkopings Och Vulcans Tandsticks Fabricks A/B, and imported into Puerto Rico.

5. That the 'Tres Palmas' round-stick matches are die-cut from previously prepared blocks of soft, straight grained

white pine, known as 'Cork-Pine', whereas the 'Three Stars' square stick matches are severed directly from sheets of wood veneer of a hardwood known as Aspen.

6. That the cost to the manufacturers of the 'Three Stars' brand of producing round-stick matches is at present greater than the cost of producing square-stick matches, and that such manufacturers can not now determine whether they will ultimately be able to produce round-stick matches at a cost not greater than that of producing square stick matches."

It is to be noticed that in this Agreed Statement of Facts no reference is made whatsoever to the "characteristics" of un-colored ROUND and SQUARE stick matches *in general*, or to the "characteristics" of any particular brand of matches other than the domestic ROUND stick matches manufactured and sold by the local corporation Pan American Match Company, and the Swedish SQUARE stick matches brought into Puerto Rico by the respondent, the only differences between these two particular brands of matches disclosed by the Stipulation being:

> (a) That the stem or stick of the domestic match has an approximately round cross-section while that of the Swedish brand has an approximately square cross-section.
>
> (b) That the domestic match is die-cut from previously prepared blocks of soft, straight grained white pine, known as "Cork-Pine" while the Swedish match is severed directly from sheets of wood veneer of a hardwood known as Aspen.
>
> (c) That the *present* cost to the manufacturer of the Swedish round-stick matches is higher than the present cost to him of the Swedish square-stick matches, but he is unable to determine *now* whether he will ultimately be able to produce round-stick matches at a cost not higher than that of producing square-stick matches.

The classification is not based on retail price, because both are sold for one cent per box (R. 53); it is not based on the kind of wood, because regardless of that, a round stick match of Aspen, or any other kind of wood, pays 10 cents, while a square stick match of white or cork pine, or any other kind of wood, pays 30 cents; it is not based on the material or substance going into the preparation of the tip or head of the match, as the classification is only based on the shape of the stem or handle; it is not based on the process of their manufacture, because even if the round stick match was severed directly from sheets of wood veneer, it would pay 10 cents only, while a square stick match even if die-cut from previously prepared blocks, would pay 30 cents, inasmuch as the tax differential is based exclusively on the shape of the stem or stick, and as far as that is concerned, the matches may be whittled out with a knife or produced by any other process whatsoever. There is nothing on the record to show the kind of wood, or the process used in the manufacture of the other brands of round stick matches paying a 10 cents tax, nor the kind of wood or the process used in the manufacture of round and square stick matches generally.

There is nothing in the record to show either the relative costs of production of round and square stick matches; the cost of production of the domestic round stick matches as compared with the other round stick matches sold in Puerto Rico, or with the Swedish square stick matches involved, the only data as to cost of production of matches being that the PRESENT cost to the manufacturer of the Swedish round stick matches is higher than that of the Swedish square stick matches, but that it cannot be determined now if the manufacturer will be ultimately able to produce round stick matches at a cost not higher than that of producing the square stick matches.

But again there is not the slightest indication that the Legislature gave any consideration to the cost of production in determining the rate of the tax, because the controlling factor was only the shape of the stick coupled with the number of sticks contained per box inasmuch as the rate differential between ROUND and SQUARE stick matches affects exclusively those packed in wooden outers or shucks containing not less than 25 but not more than 50 matches per box.

The Statement of Facts discloses, however, that the domestic brand is a ROUND stick match, packed in boxes *with* wooden outers or shucks containing *not less* than 25 but *not more* than 50 sticks per box and that the Swedish product is a SQUARE stick match, packed in boxes *with* wooden outers or shucks containing also *not less* than 25 but *not more* than 50 sticks per box, and probably that was the reason for what in our opinion was a transparent discrimination in the imposition of a tax three times as heavy as between the domestic and the imported match, included within this "narrowly defined category", as was said even by Judge Mahoney in his dissenting Opinion (R. 53).

Indeed, to sustain the classification, the only reason advanced by the petitioner before this Court and the Circuit Court of Appeals is the asserted power of the Legislature of Puerto Rico to make classifications to stimulate local industries, or as quoted by Judge Mahoney in his concurring Opinion from petitioner's brief, (R. 61): "to foster the manufacture of a type of matches (round matches) being produced in the island, locally, as well as elsewhere (in the United States mainland and capable of production likewise in Sweden), as against a type (square matches) being produced only abroad, in Sweden."

Could anybody have given a more clear, specific, and candid admission that the very purpose of this act was to

keep out a product of a friendly nation, with whom the United States "on behalf of the national interest represented by the Trade Agreement Act",—*Hale* v. *Bimco Trading,* 306 U. S. 375, 83 L. Ed. 771, entered into an Agreement granting each other:

> "ARTICLE I."—"* * * unconditional and unrestricted most-favored-nation treatment in all matters concerning the customs duties and subsidiary charges of every kind and in the method of levying duties, and further, in all matters concerning the rules, formalities and charges imposed in connection with the clearing of goods through the customs, and with respect to all laws or regulations affecting the sale or use of imported goods within the country.
>
> Accordingly, natural or manufactured products having their origin in either of the countries shall in no case be subject, in regard to the matters referred to above, to any duties, taxes or charges other or higher, or to any rules or formalities other or more burdensome, than those to which are like products having their origin in any other country are or may hereafter be subject.";
>
> ARTICLE VI.—Articles the growth, produce or manufacture of the United States of America or Sweden, shall, after importation into the other country, be exempt from all internal taxes, fees, charges or exactions other or higher than those payable on like articles of national origin or any other foreign origin." Swedish Trade Agreement, 49 Stat. (Part 2) 3755.

But if that was the purpose, the fostering of the local industry of manufacturing ROUND stick matches, would appear to be equally applicable to the same type of matches packed in boxes *with other* than wooden shucks or outers, or those packed in boxes *with* wooden shucks or outers, or otherwise, containing *less* than 25 or *more* than 50 sticks per box, yet the tax rate differential *does not affect* any

of these other classifications. Again, if the Act was passed to encourage the processing of a type of matches (ROUND stick) best adapted to the local means, and to discriminate against another type of matches (SQUARE stick) which is only manufactured abroad, in Sweden, why were both types of matches, whether ROUND or SQUARE, packed in boxes *with* wooden outers or shucks containing *less* than 25 or *more* than 50 sticks per box, *left untaxed* in the challenged act, as found both by the District Court (R. 24) and the Circuit Court of Appeals? (R. 49). If we were to accept this reason as valid, it would have to be qualified by adding that the discrimination is intended exclusively to foster the local match industry of manufacturing uncolored ROUND stick matches sold in Puerto Rico in boxes *with* wooden outers or shucks containing *not less* than 25 but *not more* than 50 sticks per box as against the Swedish match industry of manufacturing uncolored square stick matches sold in Puerto Rico in the same type of boxes containing the same number of sticks per box. But this the Legislature of Puerto Rico cannot validly do. (*Infra*, Point X, pp. 25-30.)

While the latitude given to local legislatures in the matter of classification for taxation purposes may have been broadened, this has been due not to any change in the fundamental principle involved, but rather to a more searching inquiry into the justification for the classification in the situation under consideration.

The rule of law, as applied by this Court in *Maden* v. *Kentucky*, 309 U. S. 83, 87, 88, 84 L. Ed. 590, 593, is no different today than the rule stated many years ago in *Gulf, C. & S. F. R. Co.* v. *Ellis, supra:*

> "But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general propo-

sition, this is undeniably true, Hayes *v.* Missouri, 120 U. S. 68, 30, 578; Missouri P. R. Co. *v.* Mackey, 127 U. S. 205, 32, 107; Walston *v.* Nevin, 128 U. S. 578, 32, 544; Bell's Cap R. Co. *v.* Pennsylvania, 134 U. S. 232, 33, 892; Pacific Exp. Co. *v.* Seibert, 142 U. S. 339, 35, 1035, 3 Inters. Com. Rep. 810; Giozza *v.* Tiernan, 148 U. S. 657, 37, 599; Columbus S. R. Co. *v.* Wright, 151 U. S. 470, 38, 238; Marchat *v.* Pennsylvania R. Co., 153 U. S. 380, 38, 751; St. Louis & S. F. R. Co. *v.* Mathews, 165 U. S. 1 (*ante* p. 251) yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

We submit that the conclusion arrived at by the District Court and by the Circuit Court of Appeals in the prevailing opinion rendered by Judge Mahoney to the effect that there is no rational basis for the attempted classification, and that it is therefore repugnant to Section 2 of the Organic Act, is amply supported by the record and the authorities.

Point X.

The Legislature of Puerto Rico Has No Power to Resort to Tax Classifications to Encourage or Protect Local Industries, by Putting Additional Taxes on Similar Articles Brought from the United States or Foreign Countries.

Under the provisions of Section 3 of the Organic Act, the Legislature of Puerto Rico was vested with the power to levy internal revenue taxes for the purposes of the insular

and municipal governments, but under the proviso added to the said section by the Butler Act, Congress restricted that authority prohibiting tax discriminations between articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico.

The question of whether the Legislature of Puerto Rico, under its broad legislative powers can validly levy discriminatory excises "for the encouragement of a type of manufacturing process adapted to develop local manufacturing industries in Puerto Rico as against other processes not so adapted" is, as stated before, not involved in this action, but even if so, we submit that under the guise of protecting or encouraging a certain type of manufacturing or processing of a product best adapted to local means, the Legislature of Puerto Rico has no power to establish conditions which can only be satisfied by a resident manufacturer and not by a non-resident manufacturer, nor has it the power to establish different burdens on a "similar" product brought into the Island from the United States or a foreign country, because that would result in fact in a real discrimination, and an offense against the provisions contained in Sections 2 and 3 of the Organic Act. *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421, 426, 65 L. Ed. 1029.

After the enactment of the Butler Act, the power of the Legislature of Puerto Rico to discriminate between the products brought from the United States or foreign countries and similar domestic articles came before the Circuit Court of Appeals for the First Circuit in the case of *Sancho Bonet* v. *Corona Brewing Corporation*, 89 F. (2d) 479, certiorari denied in *Corona Brewing Corporation* v. *Sancho Bonet*, 302 U. S. 699, 820, in connection with the exemption from taxation of the finished products of an industry which under a law passed by the Legislature of Puerto Rico to foster new industries in the island, had been granted a tax

exemption of its "buildings, machinery, materials, franchises, etc., and, in general, all the properties, * * * which are necessary in their work and operation". In denying the tax exemption on the finished products of that "new-industry", the Circuit Court of Appeals held:

> "We are further of the opinion that to construe Section 2, when read in connection with Act No. 1, of March 12, 1934, as exempting from taxation the products of the plaintiff's industry, to that extent, would be to render Section 2 invalid as being in violation of Section 3 of the Organic Act of Puerto Rico, as amended; for such a construction would create a discrimination in favor of an article produced in Puerto Rico as respects similar articles imported from the United States and foreign countries and taxed in Puerto Rico. Such a discrimination Section 3 of the Organic Act forbids."

This Court in the case of *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 81 L. Ed. 1122, involving an excise tax levied by Congress for a constitutional purpose on the first domestic processing of coconut oil, said:

> "It is improbable that a failure to exercise control over imports from the Philippines would injuriously affect the industries of this country; and, on the other hand, an exercise of the power to tax imports might prove injurious to the people of the islands. Congress in passing the legislation here under consideration, is not forbidden to balance these respective probabilities. The tax itself, it is said, was imposed for the purpose of protecting certain industries in this country; and it is challenged on that ground. That Congress has power to levy a tax with the collateral purpose of thereby protecting the industries of the United States is no longer open to doubt. J. W. Hampton, Jr., & Co. *v.* United States, 276 U. S. 394, 411, 72 L. Ed. 624, 631."

But the fact that Congress has the power to levy a tax with the *primary motive* of raising revenue for the benefit

of the general government with the *collateral or incidental* purpose of protecting the industries of the United States, does not by any means permit the Legislature of Puerto Rico to make a discriminatory classification of subjects of taxation with the *principal purpose*, as was said by Judge Peters, in his dissenting opinion (R. 62) "of fostering home industries", because:

> "Such assumption of national powers by a state has, ever since March 12, 1827 (Brown *v.* Maryland, 12 Wheat. 419, 6 L. Ed. 678), been found to be in collision with the Constitution." *Hale v. Bimco Trading Inc.*, 306 U. S. 375, 380, 83 L. Ed. 771, 776.

Even before the adoption of the Butler Act, the Legislature of Puerto Rico had not greater power to discriminate against foreign importations than the corresponding right of a State—*Porto Rico Tax Appeals*, 16 F. (2d) 545—but since the amendment to Section 3 of the Organic Act embodied in the proviso added by the said Butler Act, any doubts as to the existence of these powers is out of discussion. *West India Oil Co.* (*Porto Rico*) v. *Domenech*, decided November 12, 1940. (*Infra*, p. 36.)

This Court in *Walling* v. *Michigan*, 116 U. S. 446, 29 L. Ed. 691, said:

> "a discriminating tax imposed by a state *operating* to the disadvantage of the products of other states when introduced into the first mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

In *I. M. Darnell & Son Co.* v. *Memphis*, 208 U. S. 113, 123, 52 L. Ed. 413, 418, this Court after reviewing and restating its rulings concerning the nullity of any tax upon property

brought from another State as being a direct burden upon interstate commerce, if not taxed like other property situated within the State, citing *Walling* v. *Michigan, supra,* quotes with approval from *State* v. *North,* 27 Mo. 464, 471, 476, as follows:

> "But, whatever may be the motive for the tax, whether revenue, restriction, retaliation, or protection of domestic manufacturers, it is equally a regulation of commerce, and, in effect, an exercise of the power of laying duties on imports; and its exercise by the states is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to those subjects. Can any power more destructive to the union and harmony of the states be exercised than that of imposing discriminating taxes or duties on imports from other states? Whatever may be the motive for such taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures, regardless of the consequences."

It may be said that the "commerce" clause does not extend to Puerto Rico as held in *Lugo* v. *Suazo,* 59 F. (2d) 386, 390, and followed in *Sancho Bonet* v. *Bacardi Corp. of America,* 109 F. (2d) 57, but the prohibition contained in Section 3 of the Organic Act against discrimination between articles the growth, produce or manufacture of the other States or foreign nations and similar domestic articles embodies the same limitation of State power reserved to Congress.

The asserted power of the Legislature of Puerto Rico of resorting to tax classification for the purpose of protecting or encouraging local industries, by putting additional burdens on foreign manufacturers of similar articles brought from the United States or foreign countries is, we

submit, contrary to the express provisions of Sections 2 and 3 of the Organic Act, and is therefore inadmissible.

Point XI.

"Round" and "Square" Stick Matches are "Similar" or "Like" Articles Within the Purviews of Section 3 of the Organic Act of Puerto Rico and Article VI of the Swedish Trade Agreement.

The prohibition against discrimination between articles the growth, produce or manufacture of the United States or foreign countries and "similar" or "like" articles grown, produced or manufactured in Puerto Rico, contained in Section 3 of the Organic Act and Article VI of the Swedish Trade Agreement affects the validity of the tax in question, if "ROUND" and "SQUARE" stick matches are "like" or "similar" articles within the purviews of the said statute and the Trade Agreement. Are they?

We are ignoring, in the discussion of this point, all reference to the classification contained in the taxing statute as regards differences in the type of the box, in the number of sticks contained in each box and the tax-exemption allowed on ROUND and SQUARE stick matches packed in boxes with wooden outers or shucks, containing each less than 25 or more than 50 sticks per box referred to above (*ante*, p. 18). We are assuming that for all purposes, the ONLY classification is with respect to "ROUND" and "SQUARE" stick matches.

"SIMILAR" is defined in Webster's New International Dictionary (Second Edition, 1936) as nearly corresponding; resembling in many respects; somewhat like; having a general likeness. "LIKE" is defined in the same dictionary as having the same body, shape, or appearance; and hence, like; akin to; having the same or nearly the same appearance, qualities or characteristics; similar.

This Court, in *Greenleaf* v. *Goodrich*, 101 U. S. 272, 283, 25 L. Ed. 845, in construing that part of the Revenue Act of July 14, 1862, Section 9, 12 Stat. 552, fixing the duty to be paid on cloths composed wholly or in part of worsted, wool, or mohair, or goat's hair, and all goods of "similar" description, said:

> "The statute does not contemplate that goods classed under the words "of similar description" shall be in all respects the same. If it did, these words would be unnecessary. They were intended to embrace goods like, but not identical with, those named."

In the case of *Japan Import Co.* v. *United States*, Cust. & Pat. App., 86 F. (2d) 124, 131, the question arose as to the appraisement of certain imported goods, which under the Tariff Act of 1930, Section 336 (a) and (b) and the Proclamation of the President was to be made at the American selling price of the domestic article, like or similar to the imported foreign article as defined by Section 402(g). The court, following a series of previous decisions adopting the definition of the words, as taken from Webster's New International Dictionary (1925) held that:

> "The word "like" has been defined by us in American Foundation Inc. *v.* United States, 19 C. C. P. A. (Customs) 36, T. D. 44872, by the adoption of the definition of the word, as taken from Webster's New International Dictionary, 1925, as follows:
>
> "Having the same, or nearly the same, appearance, qualities, or characteristics; similar."

and with reference to the word "similar" held:

> "The word "similar" has had frequent attention on the part of this court. We first gave it extended attention in United States *v.* Irving Massin & Bros., 16 Cust. App. 19, T. D. 42714. The words involved in the statute there in issue were "such" or "similar." We

reiterated our former conclusion that the word "such" meant "identical", and as to the word "similar," referred to the definition given in Webster's New International Dictionary (1924) as follows: "Similar. a. 1. Nearly corresponding; resembling in many respects; somewhat like; bearing a general likeness."

"Further in the opinion, in elaborating on the meaning to be attached to the word "similar", we said: "In view of the common meaning of the word "similar" and of the authorities cited, we are of opinion, and so hold, that if goods are made of approximately the same materials, are commercially interchangeable, are adapted to substantially the same uses, and are so used, ordinarily, they are similar, within the meaning of section 402 (b). The importer or foreign manufacturer may not, by making a few changes in structure, or in giving the product a new name, or by restricting its sale to the American purchaser only, ipso facto remove his merchandise from section 402 (b), the foreign value provision."

In *Castell* v. *United States*, 20 F. Supp. 175, 179, the word "similar" was said to be a synonym for the word "like". In *Jones* v. *H. D. & J. K. Crosswell*, 60 F. (2d) 827, 829, involving excess profits taxes assessed and collected by the United States the question was if certain contractual privileges were "tangible" or "intangible property" depending on whether they could be classified as "other like property" with patents, copyrights, secret processes and formula, good-will, trade-marks, trade-brands and franchises, and the court held that those contracts were "intangible property" saying:

"The phrase "other like property" should not be given a narrow or restricted meaning. The word "like" means "substantially similar". It is thus defined in Webster's International Dictionary:

"I. Having the same, or nearly the same, appearance, qualities, or characteristics; resembling; similar to; similar, alike."

"In the Century Dictionary and Cyclopedia the word "like" is thus defined: "1. Of similar form, appearance, or quality; of corresponding kind, amount, extent, degree, etc.; corresponding; equal or equivalent; analogous; agreeing in some noticeable respect."

"Funk and Wagnalls New Standard Dictionary of the English Language gives this definition of the word "like": "1. Having resemblance; nearly identical in appearance or characteristics; approximate; similar; often formerly with to or unto before the object compared; as, like methods; as like as two peas. 2. Almost or quite the same in the quality considered; equal or nearly equal; virtually equivalent."

This Court in *United States* v. *Wallace*, 116 U. S. 398, 29 L. Ed. 675, involving the compensation payable to United States Commissioners, which under Section 847 of the Revised Statutes was to be the same as is allowed to clerks for like services, said:

"This view is met by the court of claims in the following extract from its opinion:

"The phrase 'like services' does not necessarily mean identical with; for by such a construction the compensation allowed to commissioner 'for any other service' would be defeated because of the subject matter of the duties of the commissioner and the clerk being somewhat different; but the statute must receive a reasonable construction, and where the service of the clerk bears a substantial resemblance to the duty performed by the commissioner, then under section 847, the commissioner would be entitled to the compensation allowed by law to the clerk, it being in legal substance a 'like service."

"The compensation of fifteen cents for each folio supposed to embrace this service, is given "for entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record certificate, return or report." Clearly, this service has no likeness to that of keeping a docket;

while the keeping of a docket by the commissioner is a like service to the keeping of a docket by the clerk, although the docket entries to be made by each may differ."

In *City of Lincoln Center* v. *Linker,* 53 P. 787, 7 Kan. App. 282, the court, after citing Webster's definition of the adjective "like" held:

> "Thus the word in a municipal ordinance making it unlawful for any person or persons to sell any malt, hop tea, hop tea tonic, ginger ale, American hop ale, cider or any other drink of a LIKE NATURE, no matter by what name it might be called, etc., applies to liquors which are like the specified liquors, in this: that they are liquids; that they are kept in bottles; that they are nonintoxicants, that they contain a mere trace in spirits; that they are put up for the Kansas trade; and finally, that they are all used as beverages."

In *Houghton* v. *Field,* 56 Mass. (2 Cush) 141, 145, it was held:

> "Saying that one article is LIKE another does not necessarily mean that they are the same in ALL particulars, but rather the contrary, that is, that they are the same in SOME particulars, and NOT in others." See also: Bissetti *v.* Roberts, 183 P. 403, 404, 25 N. M. 365; Vinegar Bend Lumber Co. *v.* Soule Steam Feed Works, 62 So. 279, 282."

That a ROUND stick wooden match may not be *identical* to a SQUARE stick wooden match, does not mean that they are not "similar" or "like" articles, specially when they resemble each other in every respect except that the cross-section of the stem of one is circular, and that of the other is square, but they are both akin in qualities, use, appearance, and general characteristics.

Point XII.

The Provisions of Section 3 of the Organic Act, and of the Swedish Trade Agreement Restrict the Powers of Classification in Taxation Vested in the Legislature of Puerto Rico.

The petitioner contends that the phrase "like articles" contained in the Swedish Trade Agreement should be construed as in *pari materia* with the phrase "similar articles" contained in the proviso added by the Butler Act to Section 3 of the Organic Act.

But he contends that neither the aforesaid proviso nor the provisions of Article VI of the Agreement, deprived the Legislature (of Puerto Rico) of the power of classification of the objects of taxation within the limitations of due process, equal protection of the law and the rule of uniformity in taxation (Brief of Petitioner, pp. 34-39). In other words, he says:

> "If they are really "similar (or "like") products, that is to say, if there is really no substantial ground whatever for differentiation between them, then there is likewise no ground for classification between them under the Constitutional requirements of due process, equal protection of the laws, and uniformity in taxation; and any legislative attempt to set up a fictitious or wholly unsubstantial differentiation for purposes of attempted classification falls under those prohibitions. If on the other hand, there actually is any such substantial difference, of any kind, that the legislative classification placing them in different groups for taxation purposes can be sustained under those Constitutional clauses, then, by the same token, they are not "similar" (or "like") products within the meaning or the intent of the Congress in this Butler Act proviso (or the Swedish Trade Agreement). (Brief of the Petitioner pp. 35-36).

The "plain purport of the words of this proviso" as said by this Court in *West India Oil Co. (Porto Rico)* v. *Domenech,* decided November 12, 1940, cited *ut supra,* is:

> "* * * That any tax authorized by the Organic Act with respect to articles of domestic production may likewise be levied with respect to imported articles "as soon as * * * (they): are manufactured, sold, used or brought into the island" provided only that there be no tax discrimination between articles brought from the United States and foreign countries and domestic articles. The amendment seems to have been occasioned by doubts which had arisen whether merchandise brought to the island from the United States was subject to local taxation while in the original package and also whether the merchandise has, while in the control of the customs authorities, the same status as respects local taxation as goods similarly controlled which have been imported from foreign countries and whether the power of the insular legislature to tax imports from foreign countries was any greater than that of the states which are forbidden, by Clause 2, of Section 10 of Art. 1 of the Constitution, to tax imports and exports without the consent of Congress. Sen. Rept. No. 1011, 69th Congress, 1st. Sess., p. 2 * * *. These questions were involved in Porto Rico Tax Appeals (CCA 1st) 16 F. (2d) 545, decided January 7, 1927, shortly before the amendment of Section 3 of the Organic Act."

The power vested upon the Legislature of Puerto Rico by the Organic Act "to all matters of a legislative character not locally inapplicable" is "as broad and comprehensive as language could make it"—*People of Puerto Rico* v. *Shell Co., supra.*—and in the exercise of these powers surely nothing more immediately touches the local concern of Puerto Rico, than legislation to encourage and protect its home industries. Nothing would have prevented the Legis-

lature of Puerto Rico, acting within the powers delegated by Congress from resorting for this purpose to tax classifications between articles the growth, produce and manufacture of the United States or foreign countries and articles grown, produced or manufactured in the island, to the same extent as any State would have been able to act, were it not for the fact that under the Constitution, Congress is vested with the power to regulate commerce among the several States and foreign nations.

But as the fostering of these interests peculiarly concerning a local problem is, in the opinion of Congress, conflicting with national policies, the Legislature of Puerto Rico was restricted in its powers of classification for taxation purposes between articles the growth, produce and manufacture of the United States or foreign countries and "similar" articles grown, produced or manufactured in Puerto Rico.

The Butler Act did not divest the Legislature of Puerto Rico of its powers of classification in taxation, and therefore, if enacted within the scope of Section 2 of the Organic Act, a taxing statute can be upheld as a valid classification if some legitimate purpose is served thereby and the motive and the end attained are the advancement of the public good and the general welfare, but the same classification may not be upheld under the provisions of Section 3 of the Organic Act, *regardless of the legitimate purpose of the classification,* if thereby a discrimination is effected between articles produced in the United States or foreign countries, and "similar" articles produced in Puerto Rico.

The "commerce" clause has not divested the states of their power of classification of the objects of taxation, but under the guise of tax classifications they cannot put barriers to the free flow of commerce from the several states or foreign nations.

No greater rights or privileges are thereby granted the foreign producer, but the Legislature is prevented from burdening him with a higher tax based on no other reason than the foreign origin of his products, even though the motive or purpose of the tax exaction may be legitimate and proper.

POINT XIII.

The Respondent Can Invoke the Reciprocal Commercial Trade Agreement With Sweden to Avoid a Discriminatory Exaction Upon "Like" Articles Brought by it Into Puerto Rico.

Article VI of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden specifically prohibit any tax discrimination between ARTICLES the growth, produce or manufacture of either country, and LIKE ARTICLES of national origin or of any other foreign origin.

The clear purpose of the treaty is to protect the ARTICLES grown, produced or manufactured in either country from higher tax exactions, than those levied upon LIKE ARTICLES of national origin or of any other foreign origin, after their importation.

The protection afforded to the articles grown, produced or manufactured in either country after their importation into the other, is a protection that covers the owners or importers thereof, as well, because a higher tax on those imported articles implies an increase in cost measured by the amount of the additional exaction.

The rights accruing under the treaty, therefore, are capable of enforcement by the owner or importer of the goods, the courts resorting to the treaty for a rule of decision for the case before it. *Head Money Tax* cases, 112 U. S. 580, 595, 28 L. Ed. 798, 804. If the protection afforded by the

Treaty could not be invoked by the importer or owner of the goods, because he is a national, that would defeat the very purpose of the treaty, and would make a mockery of it.

This Court has in the recent case of *Bacardi Corporation of America* v. *Domenech*, decided December 9, 1940, put this question at rest invalidating a statute adopted by the Legislature of Puerto Rico contrary to the protection afforded to trade-marks and labels under the General Inter-American Trade-Mark Convention of 1929, on the petition of a Pennsylvania corporation which had acquired by contract, the right to manufacture and sell rum in Puerto Rico under the trade-marks and labels of a Cuban corporation.

Point XIV.

The Square Stick Matches in Question are Exempted from Other or Higher Taxes Than are Levied on Round Stick Matches.

The Swedish Trade Agreement entered into pursuant to the powers granted the President of the United States by an Act of Congress provides under Article VI that the articles covered thereby will not be subject to "internal taxes, fees, charges or exactions, other or higher than those payable on like articles of national origin or any other foreign origin." That exemption cannot be ignored by the Legislature of Puerto Rico as it has been granted under the authority of an Act of Congress, in the interest of national industries, and is binding on the Legislature of Puerto Rico.

Upon this construction of the Trade Agreement, it is not necessary to consider the effect of Sections 2 and 3 of the Organic Act with reference to the statute in question. The matches brought into Puerto Rico by the respondent are by the express terms of the Trade Agreement exempted from other or higher taxes on like articles of national origin.

The Legislature of Puerto Rico, with the purpose of protecting and encouraging its local match manufacturing industry, levied an excise tax of 10 cents per gross on the products of local origin, and for this reason the matches of Swedish origin cannot be charged with any other tax as they are exempted by Act of Congress, from "other or higher" taxes.

It is the accepted canon that treaties should be construed liberally to give effect to the purpose which animates them, and therefore, as was said in *Bacardi Corporation of America* v. *Domenech, supra:*

> "Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred. Jordan *v.* Tashiro, 278 U. S. 123, 127, 73 L. Ed. 214, 218; Nielsen *v.* Jonson, 279 U. S. 47, 73 L. Ed. 607; Factor *v.* Laubenheimer, 290 U. S. 276, 293, 294, 78 L. Ed. 315, 324, 325."

Conclusion.

The decision of the Circuit Court of Appeals invalidating the tax in question is correct, and the Petition for Writ of Certiorari should be denied.

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